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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capability	)	

COMMENTS OF KMC TELECOM, INC.

Russell M. Blau
Patrick Donovan
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Dated: September 25, 1998

Counsel for KMC Telecom Inc.

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SUMMARY

KMC supports the Commission's initiative in this proceeding to take steps to promote the provision of advanced telecommunications capabilities to all Americans. The Commission's proposal to permit and encourage incumbent local exchange carriers (LECs) to establish deregulated separate advanced services affiliates is both misguided and unlawful, however. Congress established in Section 251(h)(1) of the Communications Act of 1934, as amended (the Act) a definition of incumbent LEC that includes "successor and assigns" of the incumbent to assure that incumbent LECs would remain subject to the obligations of Section 251, not to provide a loophole to permit incumbents to escape such regulation for the networks of the future. Moreover, the Commission's vision of such a separate affiliate would permit relationships between the incumbent and the affiliate that would assure that the affiliate enjoys the status and benefits of incumbency. Accordingly, the Commission should not adopt its advanced services affiliate proposal.

KMC believes that the best way to encourage the provision of advanced services by incumbent and competitive local exchange carriers (LECs) is to fully enforce and implement the interconnection and unbundling obligations of the Act. This would promote the fundamental market opening provisions of the Telecommunications Act of 1996 by providing CLECs with the ability to interconnect with incumbent LEC networks and obtain unbundled network elements on reasonable terms and conditions. KMC supports the Commission's proposals in this proceeding to provide for further opportunities for collocation and enhanced uses of the local loop.

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COMMENTS OF KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC"), respectfully submits the following comments in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding concerning deployment of advanced telecommunications capability to all Americans.[1]

KMC Telecom, Inc. is authorized to provide, through its subsidiaries, competitive local and long distance services in 17 states, and Puerto Rico, and is operational in six states (Alabama, Florida, Georgia, Louisiana, Texas, and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Melbourne, Florida; Savannah and Augusta, Georgia; Baton Rouge and Shreveport, Louisiana; Corpus Christi, Texas; and Madison, Wisconsin, and will soon build similar networks in several other cities in the Southeast and Midwest.

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[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("*Section 706 NRPM*").

I. SEPARATE AFFILIATES

A. Statutory Analysis

In the *Section 706 NPRM*, the Commission interpreted the statutory definition of incumbent LEC under Section 251(h)(1) of the Act to provide an opportunity for incumbent LECs to set up a wholly-owned and controlled affiliate and endow it with some degree of facilities and other assets. The Commission reasoned that such an affiliate would be free from any regulation as an incumbent LEC under Section 251 because it would not be a successor or assign of the LEC under Section 251(h).[2] Section 251(h) provides as follows:

> (h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.--
> (1) DEFINITION.-- For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that–
> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and
> (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
> (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

While, as a matter of logic, it would seem under this definition that entities that are not successors and assigns would not be incumbent LECs, it is clear that Congress in this section was not seeking to create a way for incumbent LECs to escape regulation, but just the opposite - to make sure that they did not. The fundamental purpose of Section 251 is to impose key market opening obligations on incumbent LECs that would help achieve Congress's purposes of

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[2] 47 U.S.C. Sec. 251(h)(1); *Section 706 NPRM* at para. 92.

building a competitive market for the provision of telecommunications. Given this purpose, any apparent "loophole" allowing incumbents to escape the obligations of Section 251 by means of a separate affiliate must be narrowly construed in light of, and in order to achieve, Congress's overriding objectives in enacting Section 251. The possibility that incumbents could use a wholly-owned and controlled affiliate to provide significant telecommunications services free from Section 251 obligations would undermine the Act and goes much further than anything directly envisioned in the Act or its legislative history.

Moreover, it is clear that the statutory phrase "successor or assign" would permit few, if any, transfers to an affiliate. The conventional legal definition of an assign is a party who has received an assignment of property or contract rights.[3] Similarly, an assign is an entity "to whom, property is, or will, or may be assigned."[4] Literally interpreted, any assignment of any property, no matter how small, could render the affiliate a "successor or assign." While KMC does not believe that transfers of any assets no matter how trivial or small would make an otherwise unrelated company a successor or assign for purposes of application of Section 251(c) obligations, KMC believes that a strict interpretation of the statutory language would be most consistent with the purposes of Section 251, namely, to apply market opening unbundling obligations to incumbents, not to establish mechanisms that permit them to escape those obligations. Specifically, any entity that receives a transfer of an asset from an ILEC that is used

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[3] *Restatement of Contracts Second,* Sec 323, Comment b.

[4] Black's Law Dictionary (6th ed. 1990).

in the provision of telecommunications services in the ILEC's exchange area should be treated as an "assign" of the ILEC.[5]

In addition, the *Section 706 NPRM* fails to explain how structural separation would prevent an affiliate from being a "successor or assign." The Commission's supposition that an affiliate of an incumbent LEC that (1) satisfies adequate structural separation requirements (*i.e.*, is "truly" separate); and (2) acquires, on its own, facilities used to provide advanced services (or leases such facilities from an unaffiliated entity) is not an incumbent LEC has no foundation in the statutory language. Any transfer to an owned and controlled affiliate of assets of the type and scope that would realistically be necessary to set up a separate affiliate would make the affiliate a successor or assign under Section 251(h)(1) regardless of the degree of structural separation between the affiliate and incumbent in other respects. The Commission's effort to establish structural separation as a way of permitting substantial transfers to the affiliate and have such an affiliate escapes the obligations of Section 251(c) does not comport with the statutory language and is unlawful.

B. The Separate Affiliate Envisioned by the Commission Would be a "Successor or Assign"

While the *Section 706 NPRM* purports to adopt the view that the incumbent could not generally make significant asset transfers to the affiliate or have other than an arms length relationship with the affiliate, in reality the Commission appears to be considering allowing very significant transfers and relationships between the incumbent and the affiliate. Even assuming -

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[5] A transferee of assets that are not used in providing telecommunications service (*e.g.*, office equipment, trucks, etc.) clearly would not be the kind of "successor or assign" that Congress intended.

illogically - under a literal application of the statutory language that property could be assigned without the affiliate becoming an assign, these transfers and relationships grossly exceed any reasonable limits that might prevent an affiliate from being considered a successor or assign.

In particular, the proposed *de minimis* exceptions to the general prohibition on transfers of assets to the affiliate are not *de minimis* by any stretch of the imagination. Transfers of facilities that could be unbundled network elements (UNEs) could be permitted,[6] and the *de minimis* exception could permit transfers of virtually all network equipment, other than loops, necessary to provide advanced services.[7] In addition, the affiliate might be permitted to leave some or all of any such "transferred" equipment in place,[8] could receive transfers of communications equipment for the purpose of testing new services,[9] and receive transfers of assets other than communications facilities including customer accounts, employees, and brand names.[10] The incumbent and affiliate might also be able to engage in joint marketing insofar as the affiliate is able to use customer proprietary network information gathered by the incumbent.[11] Indeed, the Commission appears to have tentatively ruled out only wholesale transfers of loops[12]

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[6] *Section 706 NPRM* at para. 106.

[7] *Section 706 NPRM* at para. 108.

[8] *Section 706 NPRM* at para. 110.

[9] *Section 706 NPRM* at para. 112.

[10] *Section 706 NPRM* at para. 113.

[11] *Section 706 NPRM* at para. 106.

[12] *Section 706 NPRM* at para. 107.

and incumbent central offices.[13] Moreover, the Commission apparently contemplates that the affiliate could be wholly owned and controlled by the incumbent.

KMC suggests that the breadth of transfers that the Commission is contemplating, combined with full ownership and control of the affiliate by the incumbent, would make the affiliate a "successor or assign." Thus, for example, the transfer of key assets which are currently, or could be, considered UNEs subject to the basic unbundling that Congress intended to accomplish, combined with transfers of other assets such as capital, key personnel, non-communications facilities, and then allowing the affiliate to keep some equipment in place and use the incumbent's CPNI would make the affiliate a successor or assign. It is absurd to suggest that an affiliate that enjoys such transfers and relationships and is wholly owned and controlled by the incumbent could be free from the obligations of the incumbent under Section 251(c). Such an affiliate would not be "truly" independent or separate even under the Commission's misguided test for what constitutes an incumbent LEC and would merely be the incumbent LEC operating under a different corporate form and, therefore, a successor or assign under Section 251(h)(1).

C. The Proposed Safeguards Are Inadequate

To the extent the Commission adopts some variation of its separate affiliate proposal, stringent structural and other safeguards should be established. The Commission has long recognized the need for stringent safeguards for incumbent LECs' provision of services on an

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[13] *Section 706 NPRM* at para. 113.

unregulated basis.[14] Regrettably, however, the Commission's proposals would confer on the affiliate special advantages, essentially passing to the affiliate the advantages and status of incumbency, to the disadvantage of competing LECs. This clearly contravenes the intent and standards of the Act.

For example, while the Section 706 NPRM apparently ruled out joint ownership of switches,[15] the Commission did not preclude joint operation and ownership of transmission facilities. The affiliate's ability to share transmission facilities, or indeed any facilities, is a significant advantage especially if the sharing arrangement provides that sharing is based on a valuation of the property at depreciated book value, thus passing on substantial cost savings to the affiliate. Obviously, any ability of the affiliate to engage in joint marketing, use the incumbent's CPNI or its trade names would confer substantial advantages on the affiliate. The Commission should prohibit any sharing of facilities, joint marketing, or use of trade names.

Similarly, the *Section 706 NPRM* proposes at several points to adopt exceptions to its requirement that the incumbent not discriminate against the affiliate in order to permit transfers

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[14] *See e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III),* Report and Order, CC docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) *(Phase I Order), recon.,* 2 FCC Rcd 3035 (1987) *(Phase I Recon. Order), further recon.,* 3 FCC Rcd 1135 (1988) *(Phase I Further Recon. Order), second further recon.,* 4 FCC Rcd 5927 (1989) *(Phase I Second Further Recon.), Phase I Order and Phase I Recon. Order, vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (California I);* Phase II, 2 FCC Rcd 3072 (1987) *(Phase II Order), recon.,* 3 FCC Rcd 1150 (1988) *(Phase II Recon. Order), further recon.,* 4 FCC Rcd 5927 (1989) *(Phase II Further Recon. Order), Phase II Order vacated, California I,* 905 F.2d 1217 (9th Cir. 1990); *Computer II Remand Proceedings,* 5 FCC Rcd 7719 (1990) *(ONA Remand Order), recon.,* 7.

[15] *Section 706 NPRM* at para 96.

to the affiliate.[16] These proposals show the essential incompatibility of the Commission's proposal with the goals of the Act. Incumbents should be required to offer any equipment available for transfer to all CLECs on a nondiscriminatory basis and not just to the affiliate. The suggested six month exemption from nondiscrimination requirements to permit transfers of facilities is in any event too long.[17] Any such exemption, which should not be adopted at all, should be limited to a very narrow time frame.

The Commission also should not permit carriers to transfer facilities that have been ordered, but not installed. This could permit carriers to order equipment now and then transfer the equipment. If the Commission allows any transfers, the Commission should only permit transfers of equipment installed as of a date well before release of the *Section 706 NPRM.*

Another example of bestowing a substantial advantage on the affiliate is the proposal to let the affiliate retain "transferred" equipment in place. The *Section 706 NPRM* tentatively concluded that to the extent that space limitations exist at the central office the affiliate would not be allowed to keep the equipment in place.[18] This would not be sufficient to protect independent carriers but would bestow on the affiliate the advantage of having been first in the central office, which would be entirely attributable to the fact that the incumbent placed the equipment there before it was "transferred" to the affiliate. The Commission should require that the incumbent publish its intent to transfer the equipment to the affiliate and leave it in place and afford

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[16] *Section 706 NRPM* at para. 111.

[17] *Id.*

[18] *Section 706 NPRM* at para. 110.

independent carriers the opportunity to request that they be able to place equivalent equipment in the central office. If there is insufficient space for all requesters, then the affiliate should be required to remove the equipment.

Further, the possibility raised by the Commission that safeguards would sunset would seriously disadvantage competitors. As long as the incumbent enjoys market power, it will have the incentive and ability to favor its affiliate and discriminate against competitors. Thus, safeguards should continue in effect until such time as the incumbent is declared non-dominant. Any earlier abandonment of safeguards would simply allow incumbents to thwart competition in provision of advanced services by favoring affiliates.[19] In this connection, and for the same reason, KMC urges the Commission to continue stringent safeguards in effect for BOC provision of long distance service under its other authority under the Act past the sunset date of Section 272 safeguards.

The *Section 706 NPRM* also raises the shocking possibility that the affiliate would be able to resell the incumbent's service and/or purchase UNEs and/or act in concert with other incumbent affiliates such as an ISP affiliate. These activities combined with other activities potentially permitted under the Commission's proposal carry a certainty of combinations and joint enterprise by the incumbent and its affiliate designed to thwart CLEC entry. For example, the advanced services affiliate could potentially have the advantage of joint marketing of its advanced services with the incumbent's local service under the incumbent's trade name. This

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[19] The Commission's suggestion that affiliates of small incumbents would be subject to a reduced set of safeguards would confer great advantages on affiliates of those entities and could essentially foreclose the advantages of competition being provided to customers of those LECs. *Section 706 NPRM* at para 98.

would confer great advantages on the affiliate so that it could obtain large numbers of customers. Having gained these customers, the affiliate could then purchase loops as UNEs and lease part of the capacity back to the incumbent for its provision of local phone service. In this way, the affiliate would control potentially large numbers of loops. While the Commission ostensibly proposes to prohibit wholesale transfers of loops, its mild description of safeguards would not necessarily preclude that result.

KMC believes that it will not be possible for an incumbent LEC to establish a separate owned and controlled affiliate subject to the type of safeguards envisioned by the Commission without irremediably favoring the affiliate to the detriment of competition. The only safeguard that might be acceptable would be for the incumbent to provide a small amount of start up capital to an affiliate and then transfer ownership of the affiliate directly to its stockholders in the same way that AT&T recently broke itself into three separate corporations. In this way, the affiliate would become "truly" separate. The new company could then seek to raise additional funding and acquire needed personnel and facilities in the same way as other CLECs.

D. Prior Approval of Separate Affiliates Should be Required

The Commission's suggestion that the network disclosure requirements of Section 251(c)(5) of the Act might be sufficient notification to the industry of transfers to the affiliate is misguided.[20] Those rules would not provide for any advance notice at all since those rules require notification of network functionality changes affecting services or interconnection parameters, and most asset transfers contemplated by the Commission would not inherently

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[20] 47 U.S.C. Sec 251(c)(5); *Section 706 NPRM* at 115.

involve these network impacts, or could be accomplished without them. This suggestion shows a serious misapprehension by the Commission of the consequences to the industry of the separate affiliate/transfers proposals. It is not technical network changes that are the focus of concern but the threat to competition contained in them.

If the Commission adopts some variation of its separate affiliate proposal, the Commission should establish a stringent preapproval process for the affiliate. The Commission should require the incumbent to submit a complete plan for establishing the affiliate including proposed asset transfers, marketing plans, and a capitalization plan, with an opportunity for public comment.[21] This approach is the minimum necessary to provide any degree of assurance that the incumbent's separate affiliate proposal will not undermine the pro-competitive goals of the 1996 Act.

E. State Regulation

In the *Section 706 NPRM*, the Commission urged states to exercise their authority over any incumbent LEC affiliate's provision of intrastate advances services in a way consistent with the Commission's policy for advanced services affiliates.[22] This approach is unworkable. While

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[21] In its *Computer II* regulatory regime the Commission established prior approval procedures for provision of enhanced services by separate affiliates of AT&T and GTE. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384, ¶ 260 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980) *(Reconsideration Order)*, *further recon.*, 88 FCC 2d 512 (1981) *(Further Reconsideration Order), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). *See also In the Matter of American Information Technologies Corp., BellSouth, NYNEX; Interim Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services (Centrex Sales Agent Order)*, 98 F.C.C.2d 943 (1984).

[22] *Section 706 NPRM* at 116.

reflecting a policy of preserving state authority, the Commission's failure to preempt, or propose to preempt, leaves in place state authority to authorize significant transfers to any affiliate, or adopt different safeguards, in connection with the affiliate's provision of intrastate services that could potentially undermine the Commission's determinations. Thus, a state could authorize transfers of loops to the affiliate for provision of intrastate advanced services notwithstanding that the Commission may have prohibited transfer of loops for provision of interstate advanced services.

However, it will not be possible, as a practical matter, for an affiliate to receive a transfer of facilities for intrastate communications without also authorizing a transfer for interstate communications, since telecommunications facilities are used inseverably for both interstate and intrastate communications. Given this inseverability, it is clear that the Commission has authority to preempt state regulation that would be incompatible with its separate affiliate scheme,[23] and indeed has established similar preemptions previously.[24] Absent such preemption, states could authorize transfers that could essentially eviscerate whatever limits on transfers the Commission adopts. Accordingly, the Commission cannot rationally proceed with its separate advanced services affiliate proposal without significant preemptions of state authority over

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[23] *See* Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, n. 4 (1986). *See also* Maryland Public Service Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th cir. 1217); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1331 (D.C. Cir. 1989); National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989); North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[24] In *Computer III* the Commission established preemptions of some state structural separation requirements. *See* n. 13, *supra.*

intrastate advanced services provided by the incumbent affiliate. Specifically, the Commission should preempt prospectively any state authorization of transfers of assets that are more lenient than those adopted by the Commission. If for some reason the Commission determines that it should not, or may not, preempt state authority in this regard, it should abandon its separate affiliate proposal.

KMC does not believe that a case-by-case approach to state preemption should be adopted in this case. This would require competitive LECs to participate in expensive and time consuming proceedings at the state level, and then, if states authorize more lenient transfers, to request preemption at the federal level from the Commission. It would be more efficient, provide certainty to the industry, and better promote the Commission's goals to establish prospective preemptions in this proceeding.

II. COLLOCATION

A. National Standards.

KMC strongly supports the Commission's proposal to adopt national collocation standards pursuant to Sections 201 and 251 of the Act.[25] KMC's experience has been that differing carrier practices and standards can delay and frustrate KMC's ability to provide competing services. Incumbent LECs are inconsistent in their standards for collocation -- what one carrier finds feasible or has been ordered to do by a state commission, another strenuously objects to. As suggested by the *Section 706 NPRM*, adoption of national standards would encourage the deployment of advanced services by increasing predictability and certainty, and by

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[25] *Section 706 NPRM* at 123.

facilitating entry by competitors operating in several states. The Commission should generally determine that any collocation practice permitted by one incumbent LEC should be required of all incumbents. Incumbent LEC networks and facilities are not so divergent that this would be unreasonable.

National standards should be established as minimum standards that states can supplement in ways that provide additional collocation opportunities. The Commission should make clear that states may not adopt collocation standards that undercut federal rules. The Commission should also make clear that competitive LECs may take advantage of collocation opportunities established in federal rules regardless of whether incumbent LECs choose to establish an advanced services affiliate. The Commission should adopt additional collocation rules because they would promote the provision of advanced services and of competitive services generally regardless of incumbent LEC's provision of advanced services.

B. Collocation Equipment.

Eligible Equipment. The Commission should mandate that competitive LECs permit collocation by CLECs of virtually any kind of telecommunications equipment used for voice and data telecommunications. CLECs should be permitted, for example, to collocate Digital Subscriber Line Multiplexers (DSLAMs) and remote access management equipment. KMC does not believe there is any basis for differentiating between circuit or packet switching equipment for purposes of collocation. Collocation of either type of equipment would promote the goals of the Act and should be permitted.

KMC does not support at this time expansion of collocation rights to providers of information services. KMC is concerned that this could rapidly exhaust central office space and thwart the competitive provision of telecommunications services that is envisioned in the 1996 Act. KMC fully supports the Commission's tentative conclusion in this regard.[26]

Interconnection between CLECs. KMC supports the Commission's effort to examine whether any further measures are necessary to assure that CLECs may interconnect with other CLECs collocating in an incumbent's central office. Direct interconnection in the incumbent's central office between CLECs is frequently the most technically efficient and cost effective way for CLECs to interconnect.

Safety Standards. KMC does not object to allowing incumbent LECs to impose reasonable safety standards on equipment eligible for collocation. NEBS standards are fully acceptable for this purpose. More stringent standards are not necessary. KMC urges the Commission to prohibit incumbent LECs from imposing more stringent safety standards or from imposing different standards on CLECs than they or any affiliate employs. In addition, the Commission should prohibit incumbent LECs from imposing performance standards of any kind. CLECs have strong incentives to employ equipment that meets acceptable performance standards and there is no reason to give incumbent LECs an opportunity to use performance standards to delay or frustrate collocation. Nor do incumbent LECs have any interest in what performance standards CLECs choose to employ that the Commission should seek to enforce through regulation.

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[26] *Section 706 NPRM* at para. 132.

C. Allocation and Exhaustion of Space

Cageless Collocation. KMC urges the Commission to mandate that incumbent LECs offer cageless collocation. It is clear that cageless collocation is technically feasible in that it is no different technically from collocation within cages. There is no basis for precluding cageless collocation based on security issues. Moreover, CLECs have as strong an interest as incumbents in maintaining the security of central offices and cages are not necessary to maintain central office security. Requiring cages also provides ample opportunity for incumbent LECs to delay and frustrate collocation. Incumbents use caged collocation to impose a number of arbitrary requirements concerning ordering, constructing, and installing cages that have the effect of substantially delaying collocation. The Commission should eliminate this unjustified opportunity for thwarting collocation.

If the Commission chooses to establish CLECs' right to cageless collocation, it should establish the terms and conditions of cageless collocation as well as procedures that will prevent incumbent LECs from thwarting collocation. The Commission should generally permit cageless collocation without a host of unnecessary security or space preparation requirements. The Commission should establish detailed procedures, including time limits, under which incumbent LECs must provide cageless collocation. KMC urges the Commission to establish time limits for incumbents to respond to requests for information and orders for collocation. It would be realistic to require incumbent LECs to provide cageless collocation within 15 days from initial ordering. KMC also urges that incumbent LECs not be allowed to require a final interconnection agreement or state certification as a precondition of ordering and obtaining collocation space.

Elimination of Space Constraints. There are a number of measures that incumbent LECs could take to provide additional space for collocation in central offices. For example, it is likely that in many instances LECs' central offices have not been particularly efficiently designed to economize on space usage. There may be unused space, or LEC equipment may not be arranged in ways that can readily accommodate collocation. Incumbent LECs may also be using older equipment that takes up a great deal of space. KMC urges the Commission to require LECs to make collocation a key design criterion of all new central offices; to make unused space immediately available for collocation; to replace older equipment; and to install all new equipment in a space-efficient manner. These measures could go a long way in providing additional space for collocation, would help implement the collocation provisions of the Act, and help promote competition.

Space Warehousing. The Commission should also modify its rules on space warehousing by incumbents.[27] The current requirement that incumbents give up space prior to denial of virtual collocation does not provide any meaningful constraint on an incumbent's ability to warehouse space. At a minimum, the Commission should set standards with more specificity on the amount of space the incumbents may reserve for future use. The Commission should also require that incumbents give up any space held in reserve prior to denial of physical collocation.

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[27] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15805-15806, paras. 694-606 (1996) (*Local Competition Order*), *vacated in part, aff'd in part*, Iowa Utils. Bd. V. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 879 (1998).

Space Exhaustion. KMC fully supports the Commission's proposal that incumbent LECs be required to prove that there is insufficient central office space for collocation by means of a tour of the central office provided to the CLEC.[28] This will help assure that genuine space limitations exist when collocation is denied for lack of space. KMC also supports the Commission's proposal that incumbents provide to CLECs on request a report showing available collocation space.[29] This would appear to be very beneficial to CLECs, should not unduly burden incumbents, and could help regulators informally monitor incumbent LECs collocation practices by providing to the industry on a more widespread basis information on available collocation space.

In the *Section 706 NPRM*, the Commission also asks what measures it could adopt that would facilitate use of virtual collocation for provision of advanced services.[30] KMC urges the Commission to consider ways for CLECs to receive collocation and at the same time own and control some of their own equipment. In effect, the Commission should permit CLECs to install their own equipment on a basis that is closely integrated with incumbent LEC facilities in the central office. This would take far less space than caged or cageless physical collocation while providing many of the benefits of physical collocation. The Commission should consider what types of equipment CLECs should be permitted to install in this manner.

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[28] *Section 706 NPRM* at para. 146.

[29] *Section 706 NPRM* at para. 147.

[30] *Section 706 NPRM* at para. 148.

III. LOCAL LOOP REQUIREMENTS

A. National Standards.

In the NPRM, the Commission expressed concern that its current rules requiring unbundling of loops do not fully ensure that competitive providers have adequate access to the "last mile."[31] The Commission sought comment on rule changes that it should adopt pursuant to Section 251 that would strengthen the ability of new entrants to gain access to xDSL-compatible loops.[32]

KMC urges the Commission to adopt national standards for local loop unbundling. National standards would promote the goals of the Act by avoiding the need to deal with a myriad of varying carrier requirements. KMC urges the Commission to adopt as a national standard any unbundling option or practice requested by CLECs that any incumbent LEC provides or that any state commission has directed an incumbent to provide.

B. Conditioned Loops

KMC urges the Commission to adopt as a national standard that incumbent LECs must provide loops on request that are free of bridge taps, load coils, and midspan repeaters. Incumbent should also be required to move loops off SLCs and DLCs without any charge. These requirements will be necessary for CLECs realistically to be able to provide advanced services.

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[31] *Section 706 NPRM* at para. 151.

[32] *Id.*

C. OSS Rules and Loops.

KMC agrees with the Commission's proposal to require incumbent LECs to provide requesting competitive LECs with sufficient detailed information about the loop so that CLECs can determine whether the loop is capable of supporting xDSL.[33] This information would enable CLECs to determine the extent to which loops are suitable for use with any equipment or services that the CLEC may be planning to provide. However, this requirement should not be used as a substitute for a requirement that incumbents provide conditioned loops on request. KMC is also concerned that incumbent LECs may argue that the Commission's proposal should not be adopted because they do not have sufficiently detailed, or readily available, information about their loops. KMC urges the Commission to require incumbent LECs to take steps to obtain the necessary information in order to comply with the Commission's requirement and to keep this information current.

D. Loop Spectrum Management.

KMC is doubtful that the Commission will obtain an adequate record in this proceeding to adopt technical rules governing loop spectrum management. The Commission should plan to rely on further industry input and should ideally base any such rules on industry consensus with CLEC participation. To the extent the Commission determines that it should look to an industry standard setting body for this purpose, the Commission should make clear that loop spectrum management standards and rules must be based on achieving the procompetitive goals of the 1996 Act. Loop spectrum management standards should not be designed to thwart or delay

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[33] *Section 706 NPRM* at para. 157.

competitive entry. For example, incumbents should not be permitted to establish interference standards that favor their own service offerings or equipment vendors.

KMC supports the Commission establishing a right of two different service providers to offer services over the same loop, such as by utilizing different parts of the DSL spectrum to provide different data services, or voice and data service. It would promote the goals of Section 706, for example, to allow a CLEC to use part of the available spectrum of the loop to provide advanced service while the incumbent continues to provide voice service over the same loop. This loop sharing would not create significant technical difficulties because existing modems and DSLAMs already permit provision of different data services, or voice and data over the same loop. KMC requests that the Commission permit CLECs to choose the equipment they will use and place in the central office for the purpose of utilizing only part of the capacity of the loop, or that will break the loop into voice and data components. KMC is concerned that absent this right incumbents may erect false technical issues to thwart CLECs' provision of competitive services.

E. Part 68 for the Central Office.

KMC supports the Commission's proposal to establish uniform, national standards for attachment of electronic equipment at the central office.[34] Part 68 standards for connection of customer-provided equipment (CPE) to the telephone network have proven to be an effective way to effectuate the customer's right to connect CPE to the public switched telephone network in ways that are privately beneficial without being publicly detrimental.[35] Moreover, compliance

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[34] *Section 706 NPRM* at para. 163.

[35] 47 C.F.R. Part 68. Customers have a right to connect equipment to the public switched telephone network in ways that are privately beneficial with being publically detrimental. *Hush-*

with those standards by equipment manufacturers is now a routine, low cost process. KMC would expect that the success of the Part 68 program for CPE would also be replicated for connection of equipment in the central office. Accordingly, KMC urges the Commission to promptly implement this proposal.

F. Sub-Loop Unbundling and Collocation at Remote Terminals.

KMC urges the Commission to extend the concept of loop unbundling to sub-loop elements, such as by access to feeder cable, portions of loops, and remote terminals, in order to further the pro-competitive goals of the 1996 Act and facilitate deployment of advanced services.[36] In situations where a loop is provisioned by means of a digital loop carrier (DLC) system at the central office, access by the CLEC at a remote terminal is likely to be the only way that the CLEC could access the loop in order to provide advanced services. This may also be the case where there is insufficient space in the central office for the CLEC to collocate equipment. It is also evident that sub-loop unbundling is technically feasible. Sub-loop unbundling can be accomplished by access at intermediate points in the loop between the central office and the end user's premises such as at telephone poles and remote pedestals. There is virtually no issue that interconnection can be accomplished at these points. Thus, the Commission should not accept incumbent LEC arguments that sub-loop unbundling is not technically feasible and should preclude incumbents from raising this as a ground for refusing sub-loop unbundling in individual cases.

A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956). *See also* cases cited at n.[22], *supra.*

[36] *Section 706 NPRM* at para 173.